

Generally, if vitamins or dietary supplements are intended by the manufacturer for human use and purport on the label to have medicinal qualities, such vitamins or dietary supplements are considered to be drugs and are taxed at the low rate of tax. However, since not many vitamins or dietary supplements are likely to have medicinal claims, the vitamins may be considered to be a food. See 86 Ill. Adm. Code 130.310. (This is a GIL).

November 8, 1999

Dear Mr. Xxxxxx:

This letter is in response to your letter dated August 20, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

My name is PERSON and I am the Chief Operating Officer for COMPANY, CITY/STATE. Until recently, we have operated as a buying club and had no representatives or agents in your state. In the middle of this year, we changed our structure to be more like a direct marketing or multi-level marketing operation. Our distributors are independent contractors, who often represent multiple companies like ours. All orders are received, accepted, processed and shipped from here in CITY. Almost all of the products are shipped to the consumer via BUSINESS. The price charged for shipping is based on a percentage of the wholesale price. I am writing this letter for several reasons. I have enclosed a package of our literature and product labels to help you in answering the following questions.

1. Should our company be collecting and remitting sales tax to your state?
2. If we should be collecting and remitting sales tax, should we do so based on the sales price that we collect or based on the suggested retail prices of the products?
3. If we should be collecting and remitting sales tax, is shipping and handling taxable in your state? Is it taxable on all products or just on the taxable products?
4. If we should be collecting and remitting sales tax, which of the products, if any, are taxable in your state?

5. Finally, if we should be collecting and remitting sales tax, should we calculate the tax based on the address the product is shipped to, or based on the home address of our independent distributor?
6. Also, is there a form or some sort of registration that we would need to fill out, in order to collect and remit taxes? If there is, could you send one to me?

Thank you for your assistance in answering these questions. I will look forward to your reply. Should you have any further questions, please do not hesitate to call me at ####.

Illinois taxes the retail sale and use of tangible personal property under two separate but related statutes. The Retailers' Occupation Tax Act imposes a tax upon persons engaged in the business of selling at retail tangible personal property. 35 ILCS 120/2 (1996 State Bar Edition). The Use Tax Act imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer. 35 ILCS 105/3 (1996 State Bar Edition).

You indicate that you have representatives in Illinois soliciting orders and that purchase orders are accepted outside of Illinois. From the limited amount of information available, it appears that your company is a "retailer maintaining a place of business in Illinois." The definition of a "retailer maintaining a place of business in Illinois" is set forth at 86 Ill. Adm. Code 150.201(i), see enclosed. An out-of-State retailer maintaining a place of business in this State is required to register with the State as an Illinois Use Tax collector. See the enclosed copy of 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of its Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability. The rate of tax under the Use Tax Act is 6.25% of the selling price of the tangible personal property. "Selling price" means the consideration for a sale valued in money whether received in money or otherwise, including cash, credits, and services. See 86 Ill. Adm. Code 150.201, enclosed.

Please find enclosed a copy of 86 Ill. Adm. Code 130.310 regarding the appropriate tax rates for food, drugs, medicines and medical appliances. As you can see from the regulation, food that is to be consumed off the premises where it is sold (other than alcoholic beverages, soft drinks, and food that has been prepared for immediate consumption) is taxed at the rate of 1% plus applicable local taxes. Food is defined as any solid, liquid, powder or item intended by the seller primarily for human internal consumption, whether simple, compound or mixed, including foods such as condiments, spices, seasonings, vitamins, bottled water and ice. Products that do not meet the appropriate definitions of food, drugs, medicines and medical appliances, or are food prepared by the vendor for immediate consumption, are taxable at the higher State sales tax rate of 6.25% plus applicable local taxes. Soft drinks are always taxed at the high rate. "Soft drinks" does not include coffee, tea, non-carbonated water, infant formula,

milk or milk products, or drinks containing 50% or more natural fruit or vegetable juice.

A medicine or drug is defined as any pill, powder, potion, salve, or other preparation intended by the manufacturer for human use and that purports on the label to have medicinal qualities. Generally, if vitamins or dietary supplements are intended by the manufacturer for human use and purport on the label to have medicinal qualities, such vitamins or dietary supplements are considered to be drugs and are taxed at the low rate of tax. However, since not many vitamins or dietary supplements are likely to have medicinal claims, the vitamins may be considered to be a food. See Section 130.310(b)(1).

The manner in which food is taxed depends upon the nature of the establishment that is selling the food. Retailers who provide seating or facilities for on-premises consumption of food generally incur tax at the high rate on all food sales (including bulk or grocery type items). However, if establishments sell both food that has been prepared for immediate consumption and bulk or grocery type items and also provide facilities for on-premises consumption, the lower rate of tax may be charged on the bulk or grocery type items only if the dining facilities are physically partitioned from the area where food not for immediate consumption is sold and these facilities utilize a separate means of collection of receipts. See 86 Ill. Adm. Code 130.310(b)(3).

If establishments have no seating or facilities for on-premises consumption of food, the tax rate incurred on food sales is determined by whether the majority (over 50%) are bulk or grocery type sales or are sales for immediate consumption. If more than 50% of all food sales are for immediate consumption, the retailer must charge the high rate on all food sales. If more than 50% of all food sales are bulk or grocery type items, all food sales are taxed at the low rate with the exception of hot foods, food that has been prepared for immediate consumption, alcoholic beverages, and soft drinks. See Section 130.310(a). Food for immediate consumption is defined in the regulation as hot food and food made ready by the retailer to be eaten without substantial delay after the final stage of preparation by the retailer.

In general, shipping and handling or delivery charges are includable in the gross receipts subject to tax unless the buyer and seller agree upon such charges separately from the selling price of the tangible personal property which is sold. In addition, such charges must be reflective of the costs of shipping and delivery. To the extent that these charges exceed the costs of shipping, they are subject to tax. See 86 Ill. Adm. Code 130.415, enclosed. As a technical proposition, handling charges represent a retailer's cost of doing business, and are consequently always includable in gross charges subject to tax. See the enclosed copy of 86 Ill. Adm. Code 130.410. However, when such charges are stated in combination with shipping charges, they will be nontaxable to the extent the above tests are met.

The best evidence that shipping and handling or freight charges have been contracted for separately from the selling price is a separate contract for shipping and handling or freight charges. A separate listing of freight charges

on an invoice, by itself, is insufficient. However, documentation that demonstrates that purchasers had the option of taking delivery of the property, at the sellers' location for the agreed purchase price, or having delivery made by the seller for the agreed purchase price, plus an ascertained or ascertainable delivery charge, will suffice.

Mail order delivery charges are deemed to be agreed upon separately from the selling price of the tangible personal property being sold so long as the mail order form requires a separate charge for delivery and so long as the charges designated as transportation or delivery or shipping and handling are actually reflective of the costs of such shipping, transportation or delivery. See subsection (d) of Section 130.415. If the retailer charges a customer shipping and handling or delivery charges that exceed the retailer's cost of providing the transportation or delivery, the excess amount is subject to tax.

Please also find enclosed Form NUC-1, Illinois Business Registration, which is used to register with the Department.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Gina Roccaforte
Associate Counsel

GR:msk
Enc.